No. 89-473

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

JAMES J. DOODY, et al.,
Petitioners,
vs.
SINALOA LAKE OWNERS ASSOCIATION, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners James J. Doody, S. S. McEwan, David J. Jacinto, J. E. Ley, V. H. Persson, and Roger Stephenson, respectfully reply to the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari, as follows:

INTRODUCTION AND RESPONSE TO RESPONDENTS' STATEMENT OF THE CASE

The basic question before the Court in this case is whether a property owner aggrieved by the destruction of property by public officials acting under authority of state police power should be entitled to damages under 42 U.S.C. § 1983, although a state remedy is available, where

the action is allegedly unnecessary, arbitrary, and/or without advance notice.

There is no real dispute that an emergency situation arose at Sinaloa Dam on March 2, 1983. However, petitioners do not dispute that respondents' allegations that the emergency was over before the dam was breached on March 11, and that this action was arbitrary and unnecessary, must be accepted as true for purposes of the issues on appeal. The issues in this case are questions of law, not facts, and are well framed by the factual stipulations of the parties.

Nevertheless, respondents have made no real effort to meet the petition on the merits. As will be discussed, respondents' opposition neither denies the existence of a serious conflict among the circuits on the ripeness of due process claims in cases of this nature, nor provides a basis for harmonizing the Ninth Circuit decision with Supreme Court precedent. Instead, respondents have sought to create a blatantly false impression of the stipulated facts in a flagrant attempt to prejudice this Court through an ad hominem attack on the DSOD officials.

We submit that based upon the record here, the emergency was precipitated by the slides on March 2, 1983 during a week of heavy rain and related events — not before — resulting in the evacuation of residents of certain areas below the dam. We hasten to add that although for purposes of this proceeding, it is admitted that the emergency did not continue to exist on the day of the breach, still it must also be admitted that March 2 was the date of inception of the operative factors of the case. But respondents insinuate that the events leading up to the breach came into play before then by virtue of DSOD's sending the letter of February 10, 1983, to the lake owners. (Brief in Opposition, pp. 2 and 14)

As the opinion of the Ninth Circuit clearly indicates, that letter was simply the result of an earlier inspection of the dam by the DSOD pursuant to its regulatory authority. (Appendix C, pp. C-8, 9.) The letter ordered the lake owners, among other things, to restore the dam spillway to its previously approved condition and to investigate the dam's safety, and requested a reply to the DSOD by March 15, 1983. (SF 28, ER 235A.) Thus, for respondents to imply that the DSOD "short circuited its own procedures" in order to "ambush[ed] the property owners" (Brief in Opposition, p. 14) because the DSOD officials did not wait until March 15 to breach the dam, "as promised," but decided on March 4th to do so is nonsense, devoid of any support in this record and, until now, a charge never even intimated by the Ninth Circuit or respondents.

We see no necessity for further comment on the respondents' deceptive presentation of the facts, for as previously indicated and stated in the petition, this Court's resolution of the petition will be made on the record as to which there can be no material conflict. With that in mind, we will briefly respond to the arguments presented by respondents.

ARGUMENT

I

THE NINTH CIRCUIT DECISION REFLECTS AN ERRONEOUS MINORITY INTERPRETATION OF *PARRATT*

The Ninth Circuit's error in concluding that the DSOD officials' acts were not "random and unauthorized" for purposes of applying *Parratt v. Taylor,* 451 U.S. 527 (1981) and its progeny was extensively discussed in the

petition. Respondents have responded primarily by repeatedly referring to petitioners as "DSOD policy-makers." This often echoed characterization begs the question. As discussed in the petition and *Easter House v. Felder,* 879 F.2d 1458 (7th Cir. 1989)(en banc), the majority of circuits that have considered the question have concluded that the mere fact that a public employee has a high level position, even one which includes policy-making, does not in itself make the deprivation foreseeable to the *state* and the result of "an established state procedure." As the *Easter House* court stated:

> "The inquiry which the Supreme Court deems relevant is whether the employee's actions were random and unauthorized *from the state's perspective,* not whether the employee held any certain position in the governmental hierarchy." (879 F.2d at 1472 (emphasis added).)

Nonetheless, respondents disingenuously assert that the DSOD had instituted a procedure for providing predeprivation process within the meaning of *Hudson v. Palmer,* 468 U.S. 517 (1984) via the February, 1983 letter, but had "... then short-circuited their own procedure by their decision to breach the dam ... 12 days before the time for the Property Owners' report on the dam's structure...." (Brief in Opposition, p. 14.)

The respondents again attempt to mislead this Court in discussing in the context of the "practicability of predeprivation due process" only the February, 1983 DSOD order that resulted from the earlier inspection of Sinaloa Dam, without even mentioning the intervening emergency that began March 2. As previously indicated, the inspection was conducted pursuant to the DSOD's statutory duties to supervise dams in the State, and the inspection discovered potentially serious problems with

the stability and maintenance of the dam. Pursuant to its supervisory authority, following the inspection the DSOD ordered the property owners to take corrective action and to respond. This order was undeniably totally separate and unrelated to the subsequent emergency triggered March 2.

Respondents have not seriously disputed that there is a significant circuit conflict concerning the issues raised in the petition. Nor have they substantively addressed the Ninth Circuit's flawed interpretation of the limitations on *Parratt v. Taylor,* 451 U.S. 527 (1981) and its progeny imposed by the "established state procedure" exception, other than to assert erroneously that a due process claim may be stated despite *Parratt* since the DSOD officials (as opposed to the state) could have provided notice and a hearing before the breaching of the dam.

Respondents have cited six cases in arguing that the Ninth Circuit's decision reinstating the lake owners' procedural due process claim is in "the mainstream of current judicial thought." (Brief in Opposition, p. 4.) None of these cases involve use of the emergency police power.[1] Ironically, four of these decisions are also from the Ninth Circuit. The only decision cited from another circuit court of appeals is the Eighth Circuit decision in *Littlefield v.*

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[1]The most recent case on point is *Miller v. Campbell County, Wyoming,* ____ F.Supp. ____, 1989 U.S. Dist. Lexis 11685 (D. Wyo. 1989) (10/2/89, Docket No. C88-0194J) where the Court was faced with an analogous situation in which a property owner was evacuated and barred from his business property as the result of an evacuation ordered by the county due to a gas leak. The Court, citing *North American Cold Storage Co. v. City of Chicago,* 211 U.S. 306, 315-321 (1908) concluded that even if an emergency did not exist at the time the order was made, the postdeprivation remedy in inverse condemnation satisfied due process.

City of Afton, 785 F.2d 596 (8th Cir. 1986). However, the *Littlefield* Court's conclusion, with little elaboration, that the deprivation of due process in connection with plaintiff's application for a building permit was the result of an "established state procedure" is questionable in that the opinion suggests that the Afton City Council *exceeded* its statutory grant of discretion under state law. (785 F.2d at 602.) Furthermore, the *Littlefield* decision is not only in apparent conflict with decisions of other circuits, but also evidence that the Eighth Circuit itself has not spoken with one voice. (See *Birkenholz v. Sluyter,* 857 F.2d 1214, 1216-17 (8th Cir. 1988).) As discussed in the petition, the Ninth Circuit's holding is definitely not within the mainstream of current § 1983 jurisprudence. It is in conflict with, and the case should be controlled by, the well reasoned decision in *Easter House, supra,* and cases discussed therein.

II

THE SUBSTANTIVE DUE PROCESS ANALYSIS OF THE NINTH CIRCUIT IS IN CONFLICT WITH OTHER CIRCUITS, AND IN NEED OF SUPREME COURT REVIEW

The respondents apparently want to have it both ways. On one hand, they bemoan the DSOD's failure to give supposed constitutionally adequate notice and opportunity for a predeprivation hearing. On the other hand they insist that a substantive due process claim can be stated, notwithstanding *Graham v. Connor,* 490 U.S. ____, 104 L.Ed.2d 443 (1989), based upon the alleged pretaking concealment of the decision to breach the dam which deprived respondents of the opportunity for hearing. Respondents baldly state that:

> "It is not the 'taking' which is 'nevertheless' a violation of substantive due process, but the *pre*-taking actions (at bench, the DSOD policy-makers' lying about their actions and concealing their decision to breach the dam and thereby depriving the Property Owners of the opportunity for a meaningful predeprivation hearing)." (Brief in Opposition, pp. 9-10.)

This argument, like the analysis in the Ninth Circuit decision, is circular and flawed in at least two respects. First, the supposed "substantive" due process claim is in fact an alleged denial of respondents' opportunity for procedural due process. Should this analysis stand, virtually every procedural due process claim would ipso facto also be pleadable as a substantive due process violation. Second, this analysis flies in the face of the Supreme Court's mandate in *Graham.* Contrary to respondents' (and the Ninth Circuit's) conclusion that the allegations of the property owners involve alleged governmental abuses "not controlled by specific protections in the Bill of Rights" (Brief in Opposition, p. 10), the claim clearly invokes the specific provisions of procedural due process as well as the express proviso of the Fifth Amendment just compensation clause. Therefore, under *Graham,* the claim should be analyzed under the specific constitutional standard of those amendments, not under the subjective due process criteria formulated by the Ninth Circuit. As discussed in the petition, the Ninth Circuit's reliance on substantive due process was clearly erroneous. When the claims are properly analyzed under the Fifth and Fourteenth Amendments, it is clear that a procedural due process claim is not ripe and that a substantive due process claim cannot be stated, as a state law remedy is available for the alleged "taking."

The cases cited by respondents are either also from the Ninth Circuit, are questionable following recent Supreme Court action, or serve to underscore further the conflict among the circuits concerning the application of the *Parratt* doctrine to, and the availability of, a substantive due process claim in property taking cases where an adequate state remedy exists. In particular, cases such as *Augustine v. Doe,* 740 F.2d 322 (5th Cir. 1984), *Williams-El v. Johnson,* 872 F.2d 224 (8th Cir. 1988) and *Gilmere v. City of Atlanta,* 774 F.2d 1495 (11th Cir. 1985) (en banc), involving excessive force, almost certainly have been overruled by *Graham.*

A number of circuits have flatly rejected substantive due process analysis in property taking cases, (see petition, pp. 25-26), or like the Seventh Circuit, have held that an arbitrary interference with property alone is insufficient to give rise to a substantive due process claim unless the state remedy is inadequate or there has been a violation "... of some other substantive constitutional right." (*Polenz v. Parrott,* 883 F.2d 551, 558 (7th Cir. 1989).)

Respondents cite *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983) to bolster their position, but a careful reading of that decision indicates that the Court's discussion concerned procedural, rather than substantive, due process. Furthermore, *Messick v. Leavins,* 811 F.2d 1439 (11th Cir. 1987), also cited by respondents, confined its discussion to an apparent procedural due process claim and is itself questionable in light of the granting of certiorari in another Eleventh Circuit decision that similarly interpreted *Parratt.* (*Burch v. Apalachee Community Mental Health Service,* 840 F.2d 797 (11th Cir. 1987) (en banc), cert. granted sub. nom. *Zinermon v. Burch,* No. 87-1965.) Like *Zinermon,* the present case involves an

important issue, likely to recur, that goes to the heart of the state government-federal judiciary relationship. The petition should be granted.

CONCLUSION

The aftermath of the recent tragic earthquake in Northern California is illustrative of the potential consequences of the Ninth Circuit's decision on the ability of government to respond effectively to actual or perceived emergencies. Dozens, if not hundreds of buildings in hard hit areas were or will soon be condemned by city building inspectors. Many have been or will be torn down as safety hazards and to facilitate clean-up operations, with owners and tenants allowed little time to salvage belongings. Under the present decision, any aggrieved property owner (or occupant) who later chooses to dispute the necessity for condemning and demolishing his or her building would be able to do so in a § 1983 action by alleging that the action in that particular case was arbitrary and that he or she was denied adequate notice and a meaningful hearing prior to demolition.[2] This would be the case even though California recognizes a property owner's right to seek damages against a government entity in such circumstances. (*Rose v. City of Coalinga,* 190 Cal.App.3d 1627, 236 Cal. Rptr. 124 (1987).)

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[2]See e.g. the pre-*Parratt* case *Poage* v. *City of Rapid City,* 431 F.Supp. 240 (D.S.D. 1977) in which a § 1983 suit was brought as a result of the city dulldozing a number of buildings damaged in a flood.

The Ninth Circuit decision is an invitation to an unwarranted federalization of state property litigation, and imposition of an intolerable burden upon public emergency officials. The petition for writ of certiorari should be granted.

Dated: October 31, 1989

Respectfully submitted,

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I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On November 1, 1989, I served the within Reply to Brief in Opposition to Petition for Writ of Certiorari in re: "James J. Doody v. Sinaloa Lake Owners Association, Inc." in the United States Supreme Court, October Term 1989, No. . . . , on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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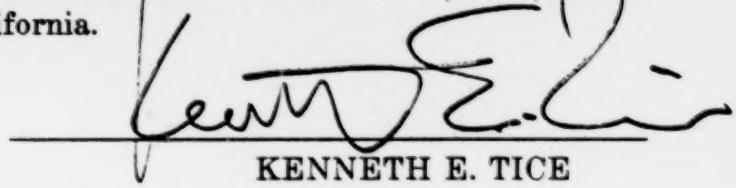
All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1, 1989, at Los Angeles, California.



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